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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1161

THOMAS M. HAAS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THOMAS M. HAAS,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Thomas M. Haas, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing a judgment rendered by the United States District Court for the Southern District of Alabama.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Alabama is reported at 440

F.Supp. 426 (S.D.Ala. 1977), and is set out in the Appendix, infra, pp. 13a-29a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 583 F.2d 216 (5th Cir. 1978), and set out in the Appendix, infra, pp. 1a-10a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1978, and a timely petition for rehearing en banc was denied on December 26, 1978. (Appendix, infra, pp. 29a-30a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. When the Court of Appeals concedes the need for additional facts may be "essential," does the unsupported allegation of a corrupt endeavor to influence and impede a grand juror for an unspecified purpose sufficiently allege the specific intent to obstruct justice and the essential knowledge of the circumstances that make an act a violation of 18 U.S.C. §1503.

2. Whether the bare allegation of the communication of unspecified information for an unstated purpose in an indictment seeking to allege the obstruction of justice sufficiently apprises the petitioner of the offense sought to be charged, protects against double jeopardy, and sufficiently informs the court of the facts alleged so it may decide whether they are legally sufficient to support a conviction.

STATUTES INVOLVED

18 U.S.C. §1503

Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence,

obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As amended October 17, 1968, Pub.L. 90-578, Title III, §301 (a) (1), (3), 82 Stat. 1115.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked by the filing of a one count indictment seeking to allege a violation of 18 U.S.C. §1503. The indictment charged that:

> "On or about the 5th day of March, 1977, in Mobile County, within the Southern Division of the Southern District of Alabama, THOMAS M. HAAS corruptly did endeavor to influence and impede Sandra D. Haas, who was then a member of a Federal Grand Jury for the Southern District of Alabama, considering the circumstances surrounding the death of Louis Wallace, by communicating information over the telephone about the matter being considered by the Grand Jury in an effort to influence and impede Sandra D. Haas in the discharge of her duty as a Grand Juror; in violation of Title 18, United States Code, Section 1503."

The petitioner moved to dismiss the indictment for failure to allege the essential elements of the offense

sought to be charged and failure to aver sufficient facts to satisfy the constitutionally mandated jeopardy and apprisal functions. After due consideration the district court dismissed the indictment. *United States v. Haas*, 440 F.Supp. 426 (S.D. Ala. 1977). Synoptically, that court held that the bare allegations in the indictment that the petitioner corruptly endeavored to influence and impede a member of a grand jury did not encompass the requirements of specific intent to commit the act and knowledge of circumstances that would make the act a violation of the obstruction of justice statute. The absence of the allegations of intent and knowledge, consequently, rendered the indictment fatally defective for failure to allege an offense.

The government appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit. In an opinion dated November 6, 1978, the Court of Appeals reversed. *United States v. Haas*, 583 F.2d 216 (5th Cir. 1978). The Court of Appeals erroneously conceived the overriding issue as whether the formal requisites of criminal pleading had been satisfied. It held that the essential elements of intent and knowledge were sufficiently alleged by the language of the indictment, taken as a whole, coupled with averment of "facts." Paradoxically, the opinion expresses concern over the adequacy of factual averment and expressly finds that the need for further information may be so essential that the failure to grant a defense motion for bill of particulars "may well be reversible error." A timely motion for rehearing en banc was duly filed but denied on December 26, 1978.

REASONS FOR GRANTING THE WRIT

This petition challenges the sufficiency of an indictment brought under 18 U.S.C. §1503, which proscribes the obstruction of justice, and is bottomed upon the separate and distinct propositions that the indictment at issue does not state the elements of the offense sought to be charged and fails to apprise the petitioner of the charge against him.

The conceptual foundation for the petition is the minimal constitutional standards a federal criminal indictment must satisfy. The opinion of the Fifth Circuit misconceives the true issue by resorting to the formal requisites of criminal pleading to gauge the sufficiency of the indictment. That court's characterization of the question of whether the elements of the offense are sufficiently alleged as "technical" demonstrates a failure to make the basic distinction between the formalities of criminal pleading and the substantive constitutional requirements.

The dilemma is compounded by the Circuit Court's anomalistic reliance upon the indictment's "facts" in support of its rationale while making express reference to the "skeletal nature of factual averment" and the explicit statement that the indictment "does not appear to meet fully the Government's obligation to permit defendant to prepare a defense."

It is of cardinal importance to recognize that the petition is cast within the contextual mold of 18 U.S.C.

§1503. In *Pettibone v. United States*, 148 U.S. 197 (1893), which addressed the sufficiency of an indictment brought under a statutory predecessor to §1503, this Court settled the specific intent to obstruct justice, not the general intent to commit an unlawful act, is an essential element of the offense proscribed. *Pettibone* further requires that the indictment charge knowledge or notice or set out facts that show knowledge or notice on the part of the accused that the witness or officer was such. Since grand jurors are included in the current obstruction of justice statute, no logical basis exists for excluding this category of persons from the knowledge requirement. It follows, therefore, that the specific intent requisite to a violation of the statute and the knowledge which must preceed that intent mandate particularized averments of these essential elements in an indictment charging an obstruction of justice. "The charge must be made directly, and not inferentially, or by way of recital." *Pettibone*, supra, at 202.

This case presents the additional significant question of whether 18 U.S.C. §1503 is so inclusive as to make criminal an unspecified act for an unknown purpose. As the District Court so aptly stated:

> "It is the design of the statute to provide a judicial environment free of intentional and knowing efforts to obstruct its operation. Punishment of inadvertent or innocent acts serves no purpose in maintaining this environment . . ." *United States v. Haas*, supra at 429.

Indicative of the import of this issue is that not a single decision of attempting to influence a grand juror in the manner alleged has ever been reported.

1. The decision below conflicts with this Court's decision of *Pettibone v. United States*, supra. The indictment therein sought to allege a conspiracy corruptly, and by threats and force, to obstruct the due administration of justice. *Pettibone* provides compelling precedent in support of the conclusion that the decision of Court of Appeals was in error. Its precedential value rests upon: (1) the explicit language that the specific intent to violate the statute, not the general intent to commit an unlawful act, is an essential element of the conduct forbidden; (2) the requirement that a legally sufficient allegation charge knowledge or set forth facts that show knowledge on the part of the accused; and (3) its irrefutable requirement that a criminal charge must be directly, not inferentially alleged.

In determining whether the indictment sufficiently alleges each material element of the offense charged the underlying question is: when the Court of Appeals concedes the need for additional facts may be "essential," does the allegation "corruptly endeavored" include the specific intent to obstruct justice and a knowledge of the circumstances that make an act a violation of 18 U.S.C. §1503. *Pettibone* answers the question in the negative.

With reference to the essential element of intent, the operative language in the indictment is "Thomas M.

Haas corruptly did endeavor to influence and impede Sandra D. Haas." The object of the alleged corrupt endeavor is not stated. Therefore, even if "corruptly endeavored" alleges an intentional act, the absence of an averment of the object of the alleged endeavor does not charge an intentional exertion toward an unlawful purpose. And it clearly does not allege the specific intent to obstruct justice. It strains credulity to maintain that the intent of the petitioner was to obstruct justice when the object of the alleged corrupt endeavor is left to the imagination.

The insufficiency of the allegation of knowledge is addressed infra in conjunction with the analysis of *Genna v. United States*, 293 F. 387 (7th Cir. 1923).

The decisions of this Court sanction the wording of an indictment in the language of a statute provided those words of themselves "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117 (1974). The mere recital of a corrupt endeavor, without stating its alleged purpose, does not aver the specific intent to violate 18 U.S.C. §1503.

Specific intent should be specified with greater particularity than general intent. *United States v. Morrison*, 536 F.2d 286 (9th Cir. 1976). As *Pettibone* establishes, the obstruction of justice requires a particular form of criminal intent.

Where a statute is silent on mens rea and criminal intent is an essential element of the crime, an indictment failing to allege such intent may be defective unless words actually appearing therein have historical meaning which might signal an allegation of mens rea. *United States v. Morrison*, supra.

Like §1503, 18 U.S.C. §1711, which was at issue in *Morrison*, is silent on mens rea, but more than a general criminal intent is an essential element of the crime. The Ninth Circuit rejected the government's argument that the element of intent could be inferred from statutory language.

In so doing, that court distinguished general and specific intent and recognized the greater particularity with which specific criminal intent must be charged. The court concluded that the requirement of greater particularity did not permit specific intent to be charged by inference.

The *Morrison* analogy is particularly applicable to the present case for two reasons: (1) more than general criminal intent is required to violate §1503; and (2) the Fifth Circuit maintains that *both* knowledge and intent are alleged by inference.

Even if the statutory language were more precise, it still "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description, with which he is charged." *Hamling v. United States*, supra, at 117-118. The opinion of the Court of Appeals makes specific reference to the "skeletal nature of the factual averments in the indictment" and concedes that "it does not appear to meet fully the government's obligation to permit defendant to prepare a defense." 583 F.2d at 221. Thus, the Circuit Court's reliance upon "facts" to support the allegation of intent and knowledge is without basis, contradictory, and cannot be harmonized with precedent.

2. The decision of the Fifth Circuit conflicts with *Genna v. United States*, 293 F. 387 (7th Cir. 1923). There the defendant was charged with having conspired to intimidate a witness. The Seventh Circuit dismissed the indictment because it failed to allege that the defendant knew the person threatened was or was about to be a witness in any trial or proceeding.

This precise defect is readily apparent in the instant indictment, which does not allege that the petitioner knew Sandra Haas, the alleged object of the corrupt endeavor, was a grand juror or what matter was before the grand jury. Nevertheless, the Court of Appeals held:

> "The recital that the defendant sought to 'influence and impede' the juror by communicating information over the telephone about the matter being considered by the grand jury is a sufficient allegation of knowledge." 583 F.2d at 220.

No authority is cited in support of this conclusion and none exists. The effect of this inference is to impermissibly allow judicial speculation to supply an essential missing link in the presumed factual chain. "The charge must be made directly, and not inferentially, or by way or recital." *Pettibone v. United States*, supra, at 202.

This tenuous proposition is further impaired by the Circuit Court's attempt to utilize the distinction between a witness, and a grand juror, as a basis for concluding that Sandra Haas' status as a grand juror reduces the standard for gauging the sufficiency of the allegation of knowledge. According to the opinion below, knowledge of one's status as a witness is a "critical element," while knowledge of one's status as a grand juror is not.

Neither logic nor law support this contention. Knowledge of the pendancy of a proceeding must, of course, preceed the intent to interfere with that proceeding. Moreover, 18 U.S.C. §1503 specifically includes grand jurors in all three categories of prohibited acts. The opinion of the Court of Appeals, therefore, seeks to create a distinction without a difference.

3. The decision of the Court of Appeals conflicts with *Russell v. United States*, 369 U.S. 749 (1962).

This argument addresses the indictment's insufficient averment of fact. In *Russell*, the indictment

sought to allege a violation of 2 U.S.C. §192, charging that the defendants had refused to answer questions that "were pertinent to the question then under inquiry" by a congressional committee.

In holding that the indictment was insufficient, this Court said:

> "(T)he very core of criminality under 2 U.S.C. §192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the statutory language of the criminal statute." 369 U.S. at 764.

This infirmity exists in the instant indictment. The crucial question in this case is what "information" the petitioner allegedly communicated over the telephone. Guilt irrefutably depends upon specific identification of this fact, and *Russell* requires the allegation of this fact in the indictment. Since the indictment fails to allege this crucial fact, *Russell* mandates the finding that it is legally insufficient.

At the risk of redundancy, it must be emphasized that the opinion below explicitly states: "(I)t (the indict-

ment) does not appear to meet fully the government's obligation to permit defendant to prepare a defense." 583 F.2d at 221. The Fifth Circuit, however, concludes that the proper remedy is the granting of a motion for bill of particulars.

> "(T)he need for further information in this case may be *essential* and the failure to grant the defendant's motion (for a bill of particulars) in such an instance may well be reversible error." 583 F.2d at 221 (emphasis supplied).

This quotation confuses the petitioner's constitutional right to know what offense is charged with the need for evidentiary details.

The Circuit Court is saying that a bill of particulars can salvage a defective indictment. "(I)t is a settled rule that a bill of particulars cannot save an invalid indictment." *Russell v. United States,* supra, at 770.

The opinion below cannot be harmonized with its own prior decision. *Van Liew v. United States,* 321 F.2d 664 (5th Cir. 1963). The defendants therein were charged with introducing into interstate commerce adulterated and misbranded food, but the indictment failed to state the manner of the alleged adulteration or misbranding. The Fifth Circuit found the indictment fatally defective because, as in the instant case, the indictment failed to factually aver how the statute at issue was allegedly violated.

The bare allegation of a corrupt endeavor to obstruct justice by communicating unspecified information is as fatally flawed as a simple allegation that food was adulterated or misbranded. The reason is the same — the indictment does not state the facts relied upon to show the act alleged was criminal. This omission in the Haas' indictment is even more egregious because the objective of the alleged corrupt endeavor is left to the imagination.

The significance of *Van Liew* is not limited to its holding, for the decision underscores a fundamental policy consideration: the federal prosecutor is not the grand jury, and he may not determine what it is the grand jury has charged. The practical effect of affirming the Circuit Court would be to vest unbridled discretion in the prosecutor to determine what constitutes criminal conduct.

4. The failure to allege the essential elements of the offense sought to be charged and sufficiently identify the transaction relied upon to demonstrate a criminal offense are constitutional infirmities, not technical defects.

The Fifth Circuit's decision constricts the protections charge by indictment are intended to provide. That Court's analytical process seeks to reinforce the wooden notion that the challenge to the instant indictment is technical and addressed only to the indictment's form.

The first prong for the attack on the sufficiency of the indictment at issue is that two material elements of the offense sought to be charged — intent to obstruct justice and knowledge are not alleged. This critical omission emphasizes the practical, not technical, challenge to the sufficiency of the indictment. A confiction based on the language of the instant indictment could be found upon any one of a host of intentions and without the knowledge required to violate the statute. This judicial precedent forbids.

The basic proposition upon which this petition rests is the failure of the Circuit Court to distinguish the formal requisites of criminal pleading and basic constitutional standards, which are the defendant's right to: (1) answer those charges brought by the grand jury and not a prosecutor's interpretation of those charges; (2) be apprised of the charge against him in order to permit the preparation of a defense; and (3) be protected against double jeopardy. Of equal importance, the court must be apprised of sufficient facts so that it may decide whether they are legally sufficient to support a conviction, should one be had. *United States v. Radetsky*, 535 F.2d 556 (10th Cir. 1976).

An analysis of these principles within the context of this case reveals that the instant indictment does not withstand constitutional scrutiny. First, failure to state what "information" was allegedly communicated or for what purpose does not inform the petitioner of the basis of the grand jury's accusation and grants the

prosecutor unbridled discretion in interpreting the charge. For aught that appears, the evidence presented to the grand jury may not have risen to the level of criminal conduct. The indictment clearly does not reveal what the grand jury believed when it returned a true bill.

Second, the Court of Appeals itself vitiates the contention of adequate apprisal by expliciting stating "it (the indictment) does not appear fully to meet the government's obligation to permit defendant to prepare a defense." 583 F.2d at 221. Again, it is axiomatic that the indictment, not a bill of particulars, must apprise the defendant of what he must meet at trial.

Thirdly, failure to identify the information and state the object of the alleged corrupt endeavor do not guarantee that the petitioner would not twice be put in jeopardy for the same offense.

Finally, a trial judge could not say after reading this indictment whether the facts, even if proved, would support a criminal conviction as a matter of law.

The government has alleged an incomplete crime, and this defective indictment could well lead to a trial on facts not sufficient to support a conviction. If facts exist to support a conviction, the indictment should so state. It would be an erroneous miscarriage of justice to require the petitioner to be tried on the skeletal allegations of the instant indictment and be compelled to wait

until the granting of a motion for judgment of acquittal reveals the evidence was insufficient from the outset.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to Hon. Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, by placing same in the United States Post Office, first class, postage prepaid, said service being made in compliance with the United States Supreme Court Rule 33(1).

BARRY HESS

APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

THOMAS M. HAAS,
Defendant-Appellee.

No. 77-3273

United States Court of Appeals,
Fifth Circuit.

Nov. 6, 1978.

Appeal from the United States District Court for the Southern District of Alabama

Before RONEY, RUBIN and VANCE, Circuit Judges.

RONEY, Circuit Judge:

Thomas Haas was indicted for obstruction of justice in violation of 18 U.S.C.A. §1503. The indictment charged that he corruptly endeavored to influence and impede a grand juror by communicating information about a matter before the Grand Jury. The district court dismissed the indictment for failure to allege essential elements of knowledge and intent. Defendant argues that the indictment also did not contain suf-

ficient specific factual data. We hold that the indictment, modeled on the language of the statute, need not contain technical terms of knowledge and intent if it recites facts and uses language which, taken as a whole, indicate knowledge and intent and that the indictment contains sufficient factual data to withstand a motion to dismiss. We reverse.

I. Background

On April 12, 1977, the following indictment charged Thomas Haas with seeking to influence a grand juror in violation of 18 U.S.C.A. §1503[1]:

1 18 U.S.C.A. §1503 reads:

§1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> On or about the 5th day of March, 1977, in Mobile County, within the Southern Division of the Southern District of Alabama, Thomas M. Haas corruptly did endeavor to influence and impede Sandra D. Haas, who was then a member of a Federal Grand Jury for the Southern District of Alabama, considering the circumstances surrounding the death of Louis Wallace, by communicating information over the telephone about the matter being considered by the Grand Jury in an effort to influence and impede Sandra D. Haas in the discharge of her duty as a Grand Juror; in violation of Title 18, United States Code, Section 1503.

Defendant moved to dismiss the indictment and for a bill of particulars, asserting a failure to allege knowledge and intent and to specify sufficiently the information communicated by defendant to the grand juror. The district court granted the motion on the former ground.

II. The Haas Indictment

The validity of the indictment, of course, can only be determined by an examination of its specific language, taking account of it as a whole in the context of its statutory background. *See United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976), (validity of indictment determined by reading it as a whole and "by practical, not

technical considerations. . . ."), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). The test is not whether the indictment could have been framed in a more satisfactory manner but whether it conforms to minimal constitutional standards. U.S.Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."). *See United States v. London*, 550 F.2d 206, 211 (5th Cir. 1977) ("The test is not whether the indictment might have been drawn with greater certainty and exactitude, but rather whether it set forth the elements of the offense charged and sufficiently apprised defendants of the charges.").

These standards require that the defendant (1) should be called to answer charges actually brought by the Grand Jury and not a prosecutor's interpretation of those charges; (2) be apprised of the charge against him in order to permit preparation of a defense; (3) be protected against double jeopardy. *Bartell v. United States*, 227 U.S. 427, 33 S.Ct. 383, 57 L.Ed. 583 (1913); *Hagner v. United States*, 285 U.S. 427, 431, 52 S.Ct. 417, 76 L.Ed. 84 (1932); *United States v. Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1975). *See also United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 558, 23 L.Ed. 588 (1876), which mentions an additional element, "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction . . . ." and *Russell v. United States*, 369 U.S. 749, 768-769, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), which treats this function as "an important corollary purpose. . . ." An indictment must

be "a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c).

Two serious questions have been raised concerning the validity of the Haas indictment. The first question relates to the averment of intent and knowledge. The second concerns the adequacy of the allegations of fact.

A. *Intent and Knowledge*

The first issue on appeal is whether an indictment under 18 U.S.C.A. §1503 alleging, in the language of the statute, that defendant corruptly endeavored to influence a grand juror is sufficient without express use of the terms "knowledge" and "intent." Both parties agree that whether knowledge and intent are necessary to sustain a conviction is not at issue. It is settled that these two elements are necessary ingredients of an offense under this statute. *Pettibone v. United States*, 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419 (1893); *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1972); *Knight v. United States*, 310 F.2d 305, 307 (5th Cir. 1962). Rather, the issue here presented focuses upon the question of whether knowledge and intent must be expressly specified in formal technical terms. *See also United States v. Purvis*, 580 F.2d 853 (5th Cir. 1978).

The indictment alleges that the defendant "corruptly did endeavor" to influence a member of a Grand Jury. The term "corruptly" means for an improper motive,

Martin v. United States, 166 F.2d 76, 79 (4th Cir. 1948) (upholding a jury charge limited to the terms "corruptly endeavored" and holding that the charge "adequately covered" the elements of intent and knowledge), or "an evil or wicked purpose," *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1972) (reversing a conviction for lack of evidence of intent). Its use together with "endeavor," see *United States v. Russell*, 255 U.S. 138, 143, 41 S.Ct. 260, 65 L.Ed. 553 (1921) ("endeavor" "describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent"), charges an intentional act. It is interchangeable with the term "willful." *Seawright v. United States*, 224 F.2d 482 (6th Cir.) (use of "willfully" in the indictment renders the term "corruptly" unnecessary), *cert. denied*, 350 U.S. 838, 76 S.Ct. 76, 100 L.Ed. 738 (1955).

Read as a whole, the indictment charges defendant with "communicating information over the telephone" concerning the circumstances surrounding the death of Louis Wallace, a matter being considered by the Grand Jury "in an effort to influence and impede" a grand juror. The phrase "corruptly did endeavor" must be read in conjunction with the latter averment which charges a deliberate and knowing act improperly to influence a grand juror. The plain and sensible meaning of the language used fairly charges an exertion toward an unlawful purpose.

The recital that the defendant sought "to influence and impede" the juror "by communicating information over the telephone about the matter being considered by the Grand Jury" is a sufficient allegation of

knowledge. The objection that "the matter" is fatally ambiguous ignores its obvious reference to the immediately preceding clause which states that the juror "was then a member of a Federal Grand Jury for the Southern District of Alabama, considering the circumstances surrounding the death of Louis Wallace." Clearly, "the matter" referred to in the indictment is the investigation of "the circumstances surrounding the death of Louis Wallace."

This situation is different from a case where the subject of alleged influence is a witness. In such a case, knowledge of the relation between the witness and judicial proceeding becomes significant and the indictment must, correspondingly, be more specific. Knowledge of the person's status as a witness is a critical element which must expressly be alleged. Where a member of a Grand Jury is the subject of influence, however, an indictment charging that the defendant corruptly endeavored to influence a grand juror by communicating information about a matter being considered by the Grand Jury sufficiently charges knowledge.

In sum, the Haas indictment is not invalid for failure to allege the requisite intent and knowledge. *See United States v. Zolli*, 51 F.R.D. 522, 526 (E.D.N.Y. 1970) ("[I]t can be fairly said that the use of the words 'corruptly endeavored' does charge the defendants with committing an intentional and knowing act, and such use in the indictment renders it sufficient."). If the allegations in

the indictment are true, defendant clearly sought to interfere with an investigation of the Grand Jury concerning the death of Louis Wallace. Although the terms "intent" or "knowledge" or their derivatives are not used, the language of the indictment demonstrates adequately intent and knowledge.

The authorities cited by defendant do not require a contrary decision. *Pettibone v. United States*, 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419 (1893), concerned a charge of conspiracy to violate an injunction. The Court held the indictment fatally defective because it "failed to allege that the purpose of the conspiracy was to violate the injunction." Absent the injunction, the acts alleged would have been legal. An allegation of knowledge of the injunction was essential. In *Genna v. United States*, 293 F. 387 (7th Cir. 1923), the indictment was struck down for failure to charge even by inference that the defendant knew that the party with whom he communicated was a witness. Here, the indictment does allege knowledge of the Grand Jury connection.

B. *Adequacy of Factual Averments*

The skeletal nature of the factual averments in the indictment, however, pose a more serious threat to its validity. The indictment does contain the basic facts necessary to apprise the defendant of the charge and to prevent double jeopardy. It states the name of the grand juror and the Grand Jury, specifies the matter before the Grand Jury, relates the information communicated to that subject matter, and sets forth the

means of communication. In the unlikely event of a subsequent indictment, defendant could surely rely upon the entire record and even parol evidence to avoid double jeopardy. *See Bartell v. United States*, 227 U.S. 427, 433, 33 S.Ct. 383, 57 L.Ed. 583 (1913); *Russell v. United States*, 369 U.S. 749, 764, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

Defendant contends, however, that the indictment fails to state what was communicated. While the bare allegation in the indictment of the communication of "information" is sufficient to withstand a motion to dismiss, it does not appear to meet fully the Government's obligation to permit defendant to prepare a defense. In such a situation, a bill of particulars is an appropriate method of seeking such information. The function of a bill of particulars is to "cure omissions of details that might enable the defendant to prepare his defense. . . ." *Norris v. United States*, 152 F.2d 808, 811 (5th Cir.), *cert. denied*, 328 U.S. 850, 86 S.Ct. 96, 15 L.Ed.2d 88 (1946).

We note that in this case the defendant has made a timely motion for a bill of particulars. The district court could more appropriately have remedied its legitimate misgivings about the adequacy of information contained in the indictment by granting this motion instead of dismissing the case. While the grant of such a motion lies within the sound discretion of the trial court, *Overton v. United States*, 403 F.2d 444, 446 (5th Cir. 1968), the need for further information in this case

may be essential and the failure to grant the defendant's motion in such an instance may well be reversible error. *United States v. Crippen*, 579 F.2d 340 (5th Cir. 1978).

Defendants attach considerable significance to the language of indictments upheld in three cases relied upon by the United States, *Knight v. United States*, 310 F.2d 305 (5th Cir. 1962); *Holland v. United States*, 245 F.2d 341 (5th Cir. 1957); *Parsons v. United States*, 189 F.2d 252 (5th Cir. 1951). While the indictments in these cases were more amply worded than the present indictment, the decisions are not authority on the issue presently before the Court in view of the fact that the indictments were upheld. These decisions nowhere purport to establish a minimal standard for an 18 U.S.C.A. §1503 indictment.

The district court erred in its dismissal of the indictment.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA

versus Criminal No. 77-36

THOMAS M. HAAS

ORDER

(Filed: September 12, 1977)

Defendant's motion to dismiss the indictment in this cause for failure to adequately state an offense coming to be heard on this 1st day of August, 1977, and it appearing to the Court that said indictment fails to allege the elements of "knowledge" and "intent," both of which are essential in the charging of an offense under 18 U.S.C. §1503, and upon consideration of all factors and substantial precedential authority, it is hereby ORDERED, ADJUDGED and DECREED that:

Defendant's motion to dismiss this indictment for failure to adequately state an offense be and the same is hereby GRANTED.

Having granted Defendant's motion to dismiss for failure to adequately state an offense, the Court declines ruling on the other motions under advisement, now moot.

So ordered this 12th day of September, 1977.

/s/DAN M. RUSSELL, JR.,
UNITED STATES DISTRICT
JUDGE

Exhibit "A"

(Number and Title Omitted)

The Grand Jury charges:

On or about the 5th day of March, 1977, in Mobile County, within the Southern Division of the Southern District of Alabama, THOMAS M. HAAS corruptly did endeavor to influence and impede Sandra D. Haas, who was then a member of a Federal Grand Jury for the Southern District of Alabama, considering the circumstances surrounding the death of Louis Wallace, by communicating information over the telephone about the matter being considered by the Grand Jury in an effort to influence and impede Sandra D. Haas in the discharge of her duty as a Grand Juror; in violation of Title 18, United States Code, Section 1503.

A TRUE BILL

FOREMAN, UNITED
STATES GRAND JURY
SOUTHERN DISTRICT OF
ALABAMA

DANIEL L. BELL, II
SPECIAL ATTORNEY
UNITED STATES
DEPARTMENT OF
JUSTICE

Penalty: 5 years and/or $5,000

OPINION

(Number and Title Omitted)

On August 1, 1977, this Court, sitting in the Southern District of Alabama, Southern Division, by designation, heard motions in the case of *United States v. Thomas M. Haas*, Criminal Action No. 77-36. The defendant, Thomas Haas is charged with obstruction of justice under 18 U.S.C. §1503. The motions, all made by the defendant, included a motion to dismiss the indictment for failure to adequately state an offense, a motion to dismiss the indictment for vagueness and overbreath of Title 18 U.S.C. §1503, as applied to the instant indictment, a motion for a bill of particulars, and a motion for a psychiatric examination of Sandra D. Haas. The Court reserved ruling on all motions and ordered the Mobile Mental Health Center to submit records to the Court for an *in camera* inspection.

The defendant's motion to dismiss for failure to adequately state an offense makes sixteen averments which the Court chooses to categorize as alleging (1)

vagueness of the indictment, (2) failure to allege knowledge, and (3) failure to allege intent. It is the defendant's contention that the indictment lacks adequate factual data to enable the defendant to prepare a defense or to enable the Court to decide whether a conviction is proper as a matter of law. The defendant also contends that the indictment is insufficient for its failure to charge that the defendant had knowledge and intent at the time he allegedly committed certain acts which were in violation of 18 U.S.C. §1503.

Looking first to Rule 7 (c) of the Federal Rules of Criminal Procedure, the Court notes the statutory requirements of an indictment are that it be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." The Supreme Court, confronted with the question of sufficiency of an indictment, has enunciated the following criteria for evaluating the sufficiency of an indictment:

> ". . . first whether the indictment 'contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet,' and second, 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' " *Russell v. United States*, 369 U.S. 749, 763-764 (1962). (Citations omitted.)

The Fifth Circuit has adopted this standard and quoted it with further elaboration in *United States v. Radetsky*, 535 F.2d 556, 562 (5th Cir. 1976):

> ". . . And a purpose corollary to the first [requirement as quoted above] is that the indictment inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. Furthermore, and of paramount importance, a sufficient indictment is required to implement the Fifth Amendment guaranty and make clear the charges so as to limit a defendant's jeopardy to offenses charged by a group of his fellow citizens, and to avoid his conviction on facts not found, or perhaps not even presented to the grand jury that indicted him." (Citations omitted).

The indictment in this case charges a violation of 18 U.S.C. §1503 which provides in relevant parts that:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede . . . any grand or petit juror . . ., or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such a juror . . ., or corruptly or by threats or force, or by any

threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The grand jury's indictment in this case was filed on April 12, 1977. It charged as follows:

"On or about the 5th day of March, 1977, in Mobile County, within the Southern Division of the Southern District of Alabama, Thomas M. Haas corruptly did endeavor to influence and impede Sandra D. Haas, who was then a member of a Federal Grand Jury for the Southern District of Alabama, considering the circumstances surrounding the death of Louis Wallace, by communicating information over the telephone about the matter being considered by the Grand Jury in an effort to influence and impede Sandra D. Haas in the discharge of her duty as a Grand Juror; in violation of Title 18, United States Code, Section 1503.

It is readily apparent that the Haas indictment tracks the language of Section 1503. In an indictment on a statute, it is generally sufficient that the indictment set forth the offense in the words of the statute as long as those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements

necessary to constitute the offense intended to be punished. See *United States v. London*, 550 F.2d 206, 210 (5th Cir. 1977); *Russell v. United States*, supra, 369 U.S. at 765. And further, the Fifth Circuit has held on a question of sufficiency the test is not whether the indictment might have been drawn with greater certainty and exactitude, but rather whether it set forth the elements of the offense, charged and sufficiently apprised the defendant of the charge to prepare for. *United States v. Markham*, 537 F.2d 187, 193 (5th Cir. 1976) cert. denied, ____ U.S. ____ (1977). An indictment that fails to allege each material element of an offense fails to charge that offense. *United States v. London*, 550 F.2d 206, 211 (5th Cir. 1977).

The Fifth Circuit decision in *United States v. Mekjian*, 505 F.2d 1320 (5th Cir. 1975) is an application of this rule. In *Mekjian*, the defendant was convicted upon sixteen counts of a sixty count indictment accusing him of filing fraudulent medicare claims in violation of Title 18, U.S.C. Sec. 1001. The court reversed the conviction for failure of the indictment to allege the essential element of "willfulness". The court considered the necessity for the indictment's alleging all the essential elements to be an assurance that the defendant be called to answer only a grand jury indictment; that the defendant be protected against double jeopardy; and that the defendant be apprised of the charge he must meet in order to effectively challenge the government's proof. In that case the government contended that the allegations of "fraudulent statement", "as he then knew he had not performed such services", "knowing-

ly", and the facts as set forth in the several counts implied that the acts were done "willfully". In rejecting this contention, the court commented:

> "The similar import doctrine advances the policy reflected in F.R.Cr.P. 7(c), against fine-combing indictments for technical errors. But the words of similar import must be clear enough to insure that the indictment meets the purposes it is intended to serve." 505 F.2d at 1324.

The *Mekjian* case, with its unequivocal requirement that an indictment clearly allege the essential elements, offers a point of departure for the consideration of the Haas indictment. The question in the case *sub judice* lacks the succinctness of that in *Mekjian*. There, the statute under which the defendant was indicted used the terminology "[w]hoever . . . knowingly and willfully falsifies . . .". The court held that because the statute uses both "willfully" and "knowingly" in defining the offense and because each encompasses a different element of the requisite *mens rea* and relies on different proof, a separate allegation of "willfulness" must appear in the indictment. Section 1503 is couched in terms of "[w]hoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede . . .". The Haas indictment, drafted in statutory language, contains no allegations of "willfulness" or "knowledge". It is the defendant's contention that both are essential

elements required in a valid indictment under section 1503 and that this indictment must fail for their absence.

The essential nature of the defendant's knowledge in a charge of obstruction of justice was recognized in *Pettibone v. United States*, 148 U.S. 197, 206 (1893):

> "It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate, or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice or set out facts that show knowledge or notice on the part of the accused that the witness or officer was such."

As an aside, it should be noted that this Court has no reservation in broadening the rule of Pettibone which speaks to an indictment for "corruptly . . . endeavoring to influence . . . a witness or officer in a court of the United States" to include such an endeavor as made to a grand juror. All three categories are included in the current obstruction of justice statute and this Court can see no reason for a distinction.

A recent decision by the Ninth Circuit in *United States v. Ryan*, 455 F.2d 728 (9th Cir. 1972) reinforces the viability of *Pettibone*. In *Ryan*, the defendant's conviction by a jury in the district court for obstruction of justice

under 18 U.S.C. §1503 was reversed and remanded for lack of sufficient evidence of intent. The court, confronted with a situation in which the alleged acts of obstruction were committed prior to a time when the defendant may have had knowledge of a grand jury investigation, held:

> "Specific intent to impede the administration of justice is an essential element of the offense. Pettibone v. United States, 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419 (1893)." 455 F.2d at 734.

The Court finds that judicial policy compels the inclusion of knowledge and intent as essential elements in a charge under section 1503 although statutory language fails to expressly require it. It is the design of the statute to provide a judicial environment free of intentional and knowing efforts to obstruct its operation. Punishment of inadvertent or innocent acts serves no purpose in maintaining this environment; therefore, the requirements of "knowledge" and "intent" should necessarily be included as essential elements in the charging of an offense for obstruction of justice.

With this recognition, the Court is confronted with the question of whether these elements have been sufficiently alleged in the Haas indictment. It is readily apparent that "willfully" and "knowingly" do not appear in the instant indictment. The government contends

that the indictment is nonetheless valid and cites four Fifth Circuit cases in support of its argument.

In *Knight v. United States*, 310 F.2d 305 (5th Cir. 1962) the defendant was convicted on one of four counts in an indictment charging violations of 18 U.S.C. §1503. That count of the Knight indictment contained the following language:

> " 'On or about the 22nd day of March, 1961, in the Macon Division of the Middle District of Georgia, within the jurisdiction of this Court, said James Terrell Knight did unlawfully, willfully, knowingly, and corruptly endeavor to influence, obstruct and impede the due administration of justice . . . James Terrell Knight knowing that the said Lawrence L. Knight was a witness in said criminal case then pending against him . . . did . . . unlawfully, willfully, knowingly and corruptly offer and agree to pay to one Betty Frances Pope the sum of $100.00 . . . as an inducement to the said Betty Frances Pope to endeavor to influence . . . the said Lawrence L. Knight . . .' " 310 F.2d 306.

The court upheld the indictment which was attacked on the ground of failure to allege a purpose or intention to obstruct the administration of justice.

In considering the *Knight* case for guidance in the case *sub judice*, this Court notes that the indictment in that case does not contain a flaw similar to that alleged to exist in the Haas indictment. The Knight indictment charges that the defendant "unlawfully, willfully, knowingly and corruptly endeavored to influence, obstruct, and impede the due administration of justice . . .". First, it should be noted that the alleged endeavor was charged to be "unlawful," "willful," and "knowing" as well as "corrupt". These allegations, if made in the Haas indictment, would have unquestionably satisfied the requirement that the indictment include the essential elements of knowledge and intent. Secondly, and a bit more complex, is the recognition that the import of the *Knight* decision goes to a violation under §1503 that is not alleged in the Haas indictment. The Knight indictment was brought under the third clause of section 1503 which speaks to endeavors "to influence, obstruct, or impede the due administration of justice." Haas was indicted under the first clause of section 1503 for an alleged endeavor to influence and impede a member of a grand jury. The distinction in the offense under each of these two clauses results in a corresponding variance in the essential elements required to be charged. In the indictment for obstruction of the administration of justice, the court in *Knight* did not consider an allegation of specific intent to obstruct the administration of justice necessary, but it nevertheless held that:

> ". . . There is no question but that there must exist a specific intent in order to violate §1503.

> Pettibone v. United States (1893), 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419. This specific intent must be to do some act or acts which tend to impede or influence, obstruct, or impede the due administration of justice."

An examination of the Knight indictment reveals the requisite allegation of intent to commit the alleged act which constituted obstruction of the administration of justice. Upon such a consideration, this Court finds that *Knight* case to be a reinforcement of the defendant's position that an indictment under section 1503 must charge the defendant with a willful and knowing act.

In *Holland v. United States*, 245 F.2d 341 (5th Cir. 1957), a second case cited by the government, the court denied the defendant-appellant's claim that failure to allege a purpose on the part of the defendant to obstruct the administration of justice rendered the indictment under section 1503 invalid. The indictment in *Holland* provided as follows:

> "That on or about the 31st day of October, 1955, at Jacksonville, in the Southern District of Florida, HORACE WORTH HOLLAND, hereinafter called the defendant, did corruptly endeavor to influence one Arlie C. Holland, who, as the defendant then and there well knew, was then a member of a petit jury panel that had been summoned for jury duty in the United States District Court for the Southern

> District of Florida, Jacksonville Division, to try, among other cases, the case of the United States of America versus Edward W. Crockett, Jr., and others, Number 9215 - Criminal - J, in the discharge of his, the said Arlie C. Holland's, duty as such juror, that is to say: at said time and place the defendant communicated by telephone with said Arlie C. Holland a statement to the effect that he, the defendant, understood that said Arlie C. Holland was a member of the panel from which would be drawn a jury to try one Edward W. Crockett, Jr., and that any consideration for the said Edward W. Crockett, Jr., coming from such jury would be appreciated; in violation of Title 18, United States Code, Section 1503."

Since the indictment charged an offense of endeavoring to influence a witness under the first clause of section 1503, the allegation of a "purpose to obstruct the due administration of justice" from the third clause of section 1503 is clearly unnecessary. With this distinction made, the *Holland* case cannot be taken to disavow the requirement of showing intent under the first clause of section 1503. Much to the contrary, the indictment alleges specific facts to the effect that the defendant knew the person he is alleged to have endeavored to influence was a member of a petit jury panel at the time of such endeavor and further, that he made a statement to that effect at the time he endeavored to so influence. Here again, the Court is confronted with a case that does not embrace the issue of

the instant case; yet, it lends support to the defendant's contention by the presence of the essential elements, knowledge and intent, in the indictment.

The government has cited *Beale v. United States*, 327 F.2d 227 (5th Cir. 1964) for the proposition that an indictment under section 1503 charging the defendant simply with unlawfully and corruptly endeavoring to impede petit jurors was held legally sufficient. An examination of a certified copy of the indictment from the *Beale* case, offered by the defendant as an exhibit to the hearing on the motion, reveals that each of the fourteen counts alleging violations of section 1503 charged the defendant with an act wherein he did "unlawfully, knowingly, and corruptly endeavor to impede the administration of justice". Although the indictment is absent any reference to "intent", it clearly contains allegations that the defendant acted with knowledge.

The opinion in *Parsons v. United States*, 189 F.2d 252, (5th Cir. 1951) provides in part as follows:

> "The attack upon the indictment for failing to allege that the defendant knew that the person he was charged with endeavoring to corruptly influence was, or was to be, a witness is completely hypercritical and without substance. The indictment, in the exact language of the statute, plainly and by necessary implication, precisely charges the defendant with the crime denounced thereby." 189 F.2d at 253.

The indictment in that case charged that the defendant did "willfully, knowingly, unlawfully, and corruptly endeavor to influence Dennis Herschel Greene, a witness," by both threats and an offer of money. Although the indictment did not specifically allege facts that set out the defendant knew Greene was a witness, it charged that the defendant acted "knowingly" thus serving the same end.

Reviewing the government's authority, the Court finds that with the exception of an allegation of intent in the *Beale* indictment, each case, regardless of its holding is based on an indictment that alleges the defendant "willfully" and "knowingly" committed an act prohibited under section 1503. This realization further strengthens the Court's earlier conclusion that "knowledge" and "intent" are essential elements of a valid indictment under section 1503. As noted earlier, the present indictment contains no such allegations and in the absence of authority to establish the validity of such an indictment under section 1503, the government is relegated to the argument that the similar import of "corruptly" would include the requisite "willfulness" and "knowledge". The test is whether the words of similar import are clear enough to insure the indictment meets the purpose it is intended to serve. United States v. Mekjian, supra at 1324.

In at least one case — *United States v. Zolli*, 51 F.R.D. 522 (E.D. N.Y. 1970) — the court has held that the use of the words "corruptly endeavored" charged the defendant with committing an intentional and knowing act and that such use in the indictment renders it

sufficient. In reaching its conclusion, the court made the following statement:

> ". . . The word 'corruptly' has been held to mean with 'improper motive'. Martin v. United States, 166 F.2d 76 (4th Cir. 1948). The word 'endeavor' is defined by Black: 'To exert physical and intellectual strength toward the attainment of an object; a systematic or continuous effort'. Black's Law Dictionary 621 (4th Ed. 1957)," 51 F.R.D. at 526.

From these definitions the court concluded the indictment was valid absent specific allegations of "knowledge" or "intent". This Court, however, is not eager to indulge in so simple a word game in view of the grave consequences that accrue to the defendant charged under an insufficient indictment.

It has been held that where a statute is silent on *mens rea* and criminal intent is an element of the crime, the indictment failing to allege such intent may be defective unless words actually appearing therein have historical meaning, either in statutory history or in common law, which might signal an allegation of *mens rea*. *United States v. Morrison*, 536 F.2d 286 (9th Cir. 1976). In the *Morrison* case, the defendant was charged in statutory language with misappropriating less than $100 in postal funds in violation of 18 U.S.C. §1711. The crime required a showing of specific intent although the statute is silent on *mens rea*. After exploring the common law meaning of the phraseology used in the

indictment, the Ninth Circuit Court of Appeals vacated the lower court's denial of the defendant's motion for acquittal with a finding that an allegation in the indictment that the defendant "did convert . . . without authority by law" did not allege the requisite intent. The decision here is based on more than a pronouncement of the court and it commands a greater assurance of affording to the defendant the safeguards intended by the grand jury system.

In the instant case, the Court has attempted to find definitive language on the allegation of "corruptly" as to its common law relationship with the essential elements of section 1503. The courts have used various definitions of "corruptly". It has been held to mean an "evil or wicked purpose", *United States v. Ryan*, supra at 734; an "improper motive", *Martin v. United States*, 166 F.2d 76 (4th Cir. 1948); and by implication, an "improper purpose", *Holland v. United States*, supra. Even so, the search has produced no convincing authority to the effect that the allegation "corruptly endeavored" encompasses the requirement of a specific intent to commit the act and a knowledge of the circumstances that make the act a violation of the statute.

This Court does not seek to constrain the import of statutory language under section 1503 by holding "corruptly endeavor" an insufficient allegation of the essential elements of knowledge and intent; yet, under the facts in this case; in the absence of more definitive authority; and upon a realization that the Court's instruction to the jury on finding the missing element

will not cure an omission of an essential element from the indictment, *United States v. Mekjian*, supra at 1325, the Court is compelled to grant the defendant's motion to dismiss.

Having granted the defendant's motion to dismiss, the Court declines ruling on the other motions under advisement, now moot.

An order in accordance with this opinion may be submitted to the Court within five days.

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT
JUDGE

DATED Sept. 7, 1977

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

December 26, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-3273 — UNITED STATES OF AMERICA v.
THOMAS M. HAAS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ SALLY HAYWARD
Deputy Clerk

cc: Ms. Miriam R. Eisenstein
Mr. Frank Allen, Jr.
Mr. Barry Hess
Mr. Chris Galanos

Supreme Court, U. S.
FILED
MAR 8 1979
MICHAEL RODAK, JR., CLERK

No. 78-1161

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS M. HAAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

DREW S. DAYS, III
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1161

THOMAS M. HAAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 583 F. 2d 216. The opinion of the district court (Pet. App. 13a-29a) is reported at 440 F. Supp. 426.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1978, and a petition for rehearing was denied on December 26, 1978 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on January 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment in this case, which alleges that petitioner corruptly endeavored to impede and

influence a grand juror in the discharge of her duty, is sufficient to state an offense under 18 U.S.C. 1503.

2. Whether the indictment in this case adequately informs petitioner of the charge against him.

STATEMENT

In October 1976, officials of the Mobile County Sheriff's Department allegedly learned that inmates at the Mobile County Jail were planning to escape by digging a hole through the north wall of the jail. Rather than prevent the escape attempt, the officials allegedly agreed to allow it to proceed so that the inmates could be ambushed and shot as they tried to flee. The attempted escape occurred on October 12, 1976; in the course of it, inmate Louis Wallace was shot to death.

A grand jury of the United States District Court for the Southern District of Alabama was empaneled to investigate this incident.[1] In March 1977, petitioner, a Mobile attorney representing a target of the investigation, allegedly contacted grand juror Sandra Haas and attempted to influence her to vote against indictments in the jail escape case. Based on this incident, petitioner was indicted for obstruction of justice, in violation of 18 U.S.C. 1503. The indictment charged that petitioner "corruptly did endeavor to influence and impede Sandra D. Haas, who was then a member of a Federal Grand Jury * * * considering the circumstances surrounding the death of Louis Wallace, by communicating information over the telephone about the matter being considered by

[1]On June 27, 1977, the grand jury indicted nine officials of the Sheriff's Department for conspiracy to violate the rights of citizens, in violation of 18 U.S.C. 241. The district court dismissed the indictment on the ground that it failed to state an offense (*United States* v. *Purvis*, 436 F. Supp. 770 (S.D. Ala. 1977)), but the court of appeals reversed (580 F. 2d 853 (5th Cir. 1978)), and this Court denied certiorari (No. 78-962, cert. denied, Feb. 21, 1979).

the Grand Jury in an effort to influence and impede [her] in the discharge of her duty as a Grand Juror * * *" (Pet. App. 16a).[2]

Petitioner moved to dismiss the indictment, contending that it failed to state an offense because it did not allege knowledge and intent and that it failed to state sufficient factual data to allow him to prepare a defense (see Pet. App. 13a-14a). The district court granted the motion on September 12, 1977. Although the court acknowledged that the indictment followed the language of the statute, it concluded that the charge was nonetheless deficient because it did not contain an express allegation of the "essential elements of knowledge and intent" (Pet. App. 28a-29a).

The government appealed and the court of appeals reversed. The court of appeals held that the allegation in the indictment that petitioner "corruptly did endeavor" to influence a member of the grand jury, when read in conjunction with the allegation that petitioner committed a deliberate and knowing act "in an effort to influence and impede" the grand juror, adequately charged "an exertion toward an unlawful purpose" (Pet. App. 6a). The court also held that the factual averments in the indictment were sufficient to withstand a motion to dismiss on the grounds of vagueness and that a bill of particulars was the appropriate remedy for petitioner to obtain more detailed information about the charge (*id.* at 9a-10a).

[2]18 U.S.C. 1503 provides in pertinent part:

> Whoever corruptly * * * endeavors to influence, intimidate, or impede any witness, in any court of the United States * * * or any grand or petit juror * * * in the discharge of his duty * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both.

ARGUMENT

1. Petitioner challenges the court of appeals' judgment reinstating his indictment. The decision places petitioner in the same position as if the district court had denied his motion to dismiss. That ruling could not have been challenged by a pretrial appeal (see *United States* v. *MacDonald*, 435 U.S. 850 (1978)), and the same considerations that counsel against permitting interlocutory appeals of such orders weigh against this Court's undertaking to review the adequacy of the indictment at this stage of the proceedings. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). At trial petitioner may be acquitted, in which event his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all of his contentions to this Court by seeking review of the final judgment.[3]

2. In any event, petitioner's claims regarding the inadequacy of the indictment are without merit for the

[3]Although petitioner contends (Pet. 15) that the indictment fails to provide sufficient notice of the charges to allow him to prepare for trial, the court of appeals indicated that it would be appropriate for the district court, on remand, to grant petitioner's motion for a bill of particulars (Pet. App. 9a-10a). As petitioner correctly notes (Pet. 14), a bill of particulars cannot cure a defective indictment. He fails to realize, however, that an indictment sufficiently specific to satisfy the constitutional due process standard may supply insufficient information to permit a defendant to prepare an adequate defense. The remedy in that situation is a bill of particulars. See *United States* v. *Cantu*, 557 F. 2d 1173, 1178 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); *United States* v. *Birmley*, 529 F. 2d 103, 108 (6th Cir. 1976); *United States* v. *Salazar*, 485 F. 2d 1272, 1277-1278 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974); *United States* v. *Leach*, 427 F. 2d 1107, 1110 (1st Cir.) cert. denied, 400 U.S. 829 (1970). That remedy would be essentially meaningless if the "apprisal" function served by the bill was considered to be identical to the "apprisal" necessary for a constitutionally valid indictment. We note that petitioner moved for a bill of particulars at the time he sought dismissal of the indictment (Pet. App. 3a).

reasons stated by the court of appeals, upon whose opinion we rely.[4] Although the indictment in the case, which tracks the statutory language (see *Hamling* v. *United States*, 418 U.S. 87, 117-118 (1974)), does not allege that petitioner acted "willfully" or "knowingly," it does charge that he made a "corrupt endeavor" to influence the grand jury. The term "corruptly" means "for an evil purpose" and, when combined with the word "endeavor," describes an act done with knowledge and mens rea (Pet. App. 6a). See, *e.g.*, *United States* v. *Fasolino*, 586 F. 2d 939, 941 (2d Cir. 1978); *United States* v. *Partin*, 552 F. 2d 621, 642 (5th Cir.), cert. denied, 434 U.S. 903 (1977); *United States* v. *Ryan*, 455 F. 2d 728, 734 (9th Cir. 1972); *Seawright* v. *United States*, 224 F. 2d 482, 483 (6th Cir.), cert. denied, 350 U.S. 838 (1955); *Martin* v. *United States*, 166 F. 2d 76, 79 (4th Cir. 1948); *United States* v. *Zolli*, 51 F.R.D. 522, 526 (E.D. N.Y. 1970).

Moreover, the indictment explicitly alleges that petitioner knew that Sandra Haas was a member of the grand jury investigating Wallace's death and that he communicated information to her "in an effort to influence and impede" her in the exercise of her duty in connection with that matter (Pet. App. 6a-7a).[5] Whether petitioner in fact acted with the requisite intent is, of course, a question for the jury. *United States* v. *Fasolino, supra*, 586 F. 2d at 941. But the indictment leaves no

[4]Contrary to petitioner's contention that the court of appeals failed to appreciate the constitutional (as opposed to "technical") dimension of his challenges to the indictment (Pet. 6, 15-16), the court below explicitly acknowledged that the test of an adequate indictment is "whether it conforms to minimal constitutional standards" (Pet. App. 4a).

[5]Petitioner is therefore incorrect in his assertion (Pet. 10) that the court of appeals found both knowledge and intent implicit in the indictment's use of the statutory language alone.

doubt that willfulness and intent must be proven at trial[6] and that a conviction cannot be based on innocent or inadvertent conduct. "The plain and sensible meaning of the language used fairly charges an exertion toward an unlawful purpose" (Pet. App. 6a). See *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927).

3. Petitioner's second contention, that omission of details of the information he allegedly conveyed to Sandra Haas renders the indictment fatally defective (Pet. 12-15), is equally insubstantial. As the court of appeals noted (Pet. App. 8a-9a), the "indictment does contain the basic facts necessary to apprise the defendant of the charge and to prevent double jeopardy. It states the name of the grand juror and the Grand Jury, specifies the matter before the Grand Jury, relates the information communicated to that subject matter, and sets forth the means of communication." In the unlikely event of a subsequent indictment based upon the same criminal act, petitioner could rely upon the entire record and even parol evidence to avoid double jeopardy. See *Russell* v. *United States*, 369 U.S. 749, 764 (1962); *Bartell* v. *United States*, 227 U.S. 427, 433 (1913).

Petitioner seeks support for his position (Pet. 13) in *Russell* v. *United States, supra*, but the omission from the indictment in *Russell* concerned the subject matter of the congressional inquiry to which the defendants' unanswered questions were allegedly "pertinent" (369 U.S. at 752).[7] Similarly, in *Van Liew* v. *United States*, 321 F. 2d 664 (5th Cir. 1963), the defendants were prosecuted under

[6]As the court of appeals observed (Pet. App. 5a), "[b]oth parties agree that whether knowledge and intent are necessary to sustain a conviction is not at issue. It is settled that these two elements are necessary ingredients of an offense under this statute."

[7]Pertinence was an element of the offense charged in *Russell*. See *Hamling* v. *United States, supra*, 418 U.S. at 118.

an indictment that failed to specify the particular way in which a complex economic statute prohibiting "adulteration" of foods offered for sale in commerce had been violated. *Id.* at 670-674. By contrast, the indictment in this case specifically identifies the subject matter under grand jury consideration with respect to which petitioner allegedly endeavored to influence and impede the grand juror.

Petitioner's indictment expressly identifies the portion of Section 1503 alleged to have been violated and "adequately relate[s] [petitioner's] actions to the statute." *Van Liew* v. *United States, supra*, 321 F. 2d at 674. See *United States* v. *Clark*, 546 F. 2d 1130, 1134-1135 (5th Cir. 1977) (distinguishing *Van Liew*). The indictment clearly charges petitioner with a corrupt endeavor to obstruct justice by influencing and impeding a grand juror. The content of the telephone communication from petitioner to Sandra Haas is an evidentiary detail, not an essential element of the crime. While it may well be important to petitioner's defense for him to know prior to trial exactly what the government intends to prove that he said to the grand juror, this information can be requested in a motion for a bill of particulars.[8]

[8]Indeed, the Fifth Circuit emphasized in *Van Liew* (321 F. 2d at 670) that a defendant's "constitutional right to know what *offense* is charged" should not be confused with "his need to know the *evidentiary details* establishing the facts of such offense. As to the latter, the remedy lies in the Motion for Bill of Particulars * * *" (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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